Note

PROMOTING PROGRESS WITH FAIR USE

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ABSTRACT

The Intellectual Property (IP) Clause provides that Congress has the power "to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In the realm of copyright, Congress and the courts have interpreted the clause as granting Congress a power not to promote progress but to establish limited IP monopolies. To return to an understanding of the IP power better grounded in the constitutional text, Congress and the courts should ensure that any IP enactment "promote[s] . . . Progress" by considering whether it improves the quality or quantity of knowledge and aids the dissemination of knowledge, and whether it does so better than prior IP enactments. The courts can exercise the fair-use doctrine to aid in this re-constitutionalization of IP law by applying a fifth fair-use factor. This proposed fifth factor would balance the progress-promoting value of the alleged infringer's use against the progress-promoting value of enforcing the copyright holder's rights. Reviewing courts should presume that any alleged infringement is fair if it promotes progress better than the enforcement of the copyright.

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INTRODUCTION

Intellectual property (IP) law in the United States is off course and headed onto the shoals of ever-increasing protectionism. Copyright law, in particular, has been commandeered by a process of industry-sponsored expansion in which Congress and the courts reviewing its legislation have acquiesced. The last forty years have seen the copyright term increase, from a modest twenty-eight years, to the life of the author plus seventy years.[1] Increases in statutory damages for copyright infringement, which can be assessed without proving actual damages, have left peer-to-peer file sharers potentially liable for multimillion-dollar judgments.[2] A Congress that can agree on little else sheathes its daggers and finds bipartisan agreement over the prospect of toughening peripheral restrictions on the online use of copyrighted material—granting the government unprecedented censorship powers over the worldwide web along the way.[3]

In sum, copyright law has come uncoupled from its constitutionally defined purpose. A tightly circumscribed right intended to incentivize creativity and the spread of knowledge has instead become an ever-expanding monopoly over creative works and the means by which those works are disseminated. Industries that rely on IP control[4] increasingly resort to legislation and litigation instead of innovation in their efforts to protect existing revenue streams and to maintain long-term control over new creations.[5] And these

1. *Compare* 17 U.S.C. § 24 (1976) ("The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . ."), *with* 17 U.S.C. § 302 (2006) ("Copyright . . . subsists from [a work's] creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death.").

2. *E.g.*, Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1048–49 (D. Minn. 2010) (considering a total jury verdict of approximately $2 million—$80,000 per infringed sound recording—which the court labeled "monstrous and shocking"); *cf.* Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 104, 122 Stat. 4256, 4259 (codified as amended at 15 U.S.C. § 1117(c) (Supp. II 2008)) (increasing civil and criminal penalties for trademark infringement).

3. "[T]he Senate Judiciary Committee unanimously approved [the Combating Online Infringement and Counterfeits Act, which] . . . . is among the most draconian laws ever considered to combat digital piracy." Sam Gustin, *Web Censorship Bill Sails Through Senate Committee*, WIRED (Nov. 18, 2010, 2:50 PM), http://www.wired.com/epicenter/2010/11/coica-web-censorship-bill.

4. Copyright industries are largely centered around entertainment—movie, music, television, and software. Patent industries include technology producers of every stripe.

5. *See* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 24 (2009) ("Litigation has become the tool by which the copyright industries deceive themselves into

copyright industries have, in the latter part of the twentieth century and the first decade of the twenty-first, found willing allies in the courts[6] and in Congress,[7] over whose eyes the copyright industries have become adept at pulling wool.

This Note offers a new weapon[8] to combat these overreaching (IP) enactments in Congress and their acceptance in the courts. Article I, Section 8, Clause 8—the IP Clause of the U.S. Constitution—grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[9] Both Congress and the courts have begun to follow a faulty but increasingly common interpretation of the grant of power to Congress in that clause. Congress and the courts have lost sight of the requirement that IP enactments "promote the Progress of Science and useful Arts."[10] Although Congress appears unlikely to address this problem,[11] the courts could take a step toward doing so by adding

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thinking they can avoid the inevitable stagnation that occurs when they fail to focus on the essential purpose of their business as a 'customer-creating and customer-satisfying organism.'").

6. *See* Eldred v. Ashcroft, 537 U.S. 186, 208 (2003) (calling the extra twenty years granted by the Copyright Term Extension Act a "rational" and therefore constitutional exercise of congressional power); PATRY, *supra* note 5, at 62–63 ("A brief presented to the Supreme Court in the *Eldred* case by 12 economists . . . demonstrated that the extra 20 years [granted by the Copyright Term Extension Act] was simply a windfall to copyright owners, a redistribution of money from consumers to copyright owners, and will result in far fewer derivative works being created as the cost of clearing rights to use works that would otherwise be in the public domain is prohibitive.").

7. PATRY, *supra* note 5, at 161 ("In 1998, the [Motion Picture Association of America] and the [Recording Industry Association of America] successfully lobbied Congress for powerful new rights in the Digital Millennium Copyright Act (DMCA)[, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.)] . . . .").

8. Other commentators have urged limitations to IP enactments based, for example, on the First Amendment. *See* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 305 (2009) (urging "that the First Amendment be read absolutely, in keeping with its first and most obvious meaning: *that Congress shall make no law abridging freedom of speech or of the press by conferring monopolies in expression that otherwise would belong to the universe of discourses in which all are free to share and share alike*" (emphasis in original)).

9. U.S. CONST. art. I, § 8, cl. 8. Congress derives its power to enact copyright and patent statutes from this clause.

10. *Id.*

11. When it considers IP at all, Congress generally attempts to expand it. *See, e.g.*, Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010) (expanding protection of copyrighted works by, for example, authorizing the Attorney General to "commence an in rem action against" a website if copyright infringement is "central to the activity" of the website).

a fifth factor to the familiar and flexible fair-use test[12]—a factor that specifically asks whether the use of a copyrighted work "promote[s] the Progress of Science and useful Arts"[13] better than the protection of the original author's rights.

Part I discusses the courts' and Congress's modern tendency to incorrectly read the IP Clause as a grant of monopoly-awarding power. Part II argues for a reading of the IP Clause that would necessarily limit Congress's power to enact IP laws by construing "promot[ion]" to require an improvement over the current state of legislation, and "Progress" to require both qualitative advancement of knowledge and encouragement to the dissemination of copyrighted works. Part III suggests a potential ameliorative step to the problems described in the previous Parts: the judicial application of a fifth fair-use factor explicitly comparing the progress-promoting value of the allegedly infringing work with that of the underlying work. This proposal, if put into effect, would have a destabilizing effect on copyright holders' rights, but it would move copyright policy back toward its constitutional foundation.

I. INTERPRETING THE IP CLAUSE

The IP Clause grants Congress the power to make laws providing exclusive rights to authors and inventors. This power conflicts with the restrictions placed on Congress by the First Amendment. Consistency with these restrictions requires a narrow, circumscribed reading of the IP Clause. Fortunately, the text of the clause already provides appropriate limitations—if only Congress and the courts could be convinced to take them seriously.

A. The Plain Meaning of the IP Clause

Copyright in the United States is a "creature of statute."[14] At its root, then, it is a creature of the Constitution, for it is an axiom of constitutional law that Congress may only legislate pursuant to one of

12. The fair use of a copyrighted work is not an infringement on the copyright. Courts determine whether a use is fair by applying a nonexclusive list of four factors. 17 U.S.C. § 107 (2006). For further discussion of the fair-use test, see *infra* notes 124–33 and accompanying text.

13. U.S. CONST. art. I, § 8, cl. 8.

14. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 883 (9th Cir. 2005).

its constitutionally enumerated powers.[15] Those affirmative legislative powers reside in Article I, Section 8 of the Constitution, a section that comprises a single sentence with a series of grammatically parallel infinitive phrases,[16] each granting Congress a specific power or cluster of powers.[17]

Unlike the other clauses in Section 8—which consist of simple grants ("[t]o provide and maintain a Navy"[18]), complex grants ("[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"[19]), or grants with express limitations ("[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"[20])—the IP Clause's structure is mildly ambiguous. This has resulted in legislative and judicial hand-wringing over what, exactly, the IP Clause empowers Congress to do.

The IP Clause grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[21] The best reading of this clause interprets the phrase "[t]o promote the Progress of Science and useful Arts" as the clause's grant of power, with the remainder of the clause serving as an internally limited means by which Congress may exercise that grant. Other readings of the clause—those that, for example, treat the grant of power as mere preamble[22]—fail to protect important free

15. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323 (1819) ("Congress, by the constitution, is invested with certain powers; and, *as to the objects, and within the scope of these powers*, it is sovereign." (emphasis added)).

16. Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of* Eldred v. Ashcroft, 44 IDEA 331, 346 (2004). Although the grants in Article I, Section 8 are—strictly speaking—phrases rather than clauses, the legal convention is to refer to them as "clauses." This Note will follow that convention.

17. U.S. CONST. art. I, § 8; Walterscheid, *supra* note 16, at 346 ("Article I, Section 8 enumerates the powers granted to Congress in eighteen separate clauses of which the Science and Useful Arts Clause is the eighth. These clauses exhibit a remarkably uniform and parallel grammatical structure. They consist of a series of infinitive verb forms, declaring the specific powers given to Congress. In each instance, the infinitive verb form is the legally operative grant of power." (footnotes omitted)).

18. U.S. CONST. art. I, § 8, cl. 13.

19. *Id.* art. I, § 8, cl. 11.

20. *Id.* art. I, § 8, cl. 12.

21. *Id.* art. I, § 8, cl. 8.

22. *E.g.*, Eldred v. Ashcroft, 537 U.S. 186, 211–12 (2003).

speech interests, including the development of a healthy and growing public domain.[23]

The IP Clause's structure comprises two elements: the progress-promoting clause ("[t]o promote the Progress of Science[24] and useful Arts"[25]) and the monopoly-granting[26] clause ("by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[27]). The most natural, plain-language reading of the IP Clause is that the progress-promoting clause, like each of the other seventeen infinitive clauses in Article I, Section 8, grants power: "[t]he Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts."[28] In the words of

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23. Recognition of the public domain as an affirmative entity, worthy of protection in its own right, largely began with David Lange's seminal 1981 essay, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (Autumn 1981). *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 294 (2008) (describing Lange's essay as "[t]he foundational essay" regarding "[t]he specific concern with the public domain"). The values underlying the public domain, however, are intertwined both with the right of free speech and the uncontroversial notion that creativity in general requires the use of others' work as a starting point. *See id.* at 122–24 (discussing the different ways in which works covered by patent and copyright build on works already in existence).

24. The Framers' understanding of "Science" was broader than the commonly accepted modern meaning of the term: it encompassed all forms of knowledge acquired by study or training, including, for example, philosophy and literature. *See, e.g.*, 14 THE OXFORD ENGLISH DICTIONARY 648 (2d ed. 1989) (defining science as "[k]nowledge acquired by study; acquaintance with or mastery of any department of learning," with this usage current for several centuries through 1781).

25. U.S. CONST. art. I, § 8, cl. 8.

26. This Note uses the term "monopoly-granting" as shorthand while acknowledging its shortcomings as a description of what the IP Clause purports to do. The clause gives Congress the power to grant authors and inventors exclusive economic rights over their creations—in effect, making those authors and inventors monopolists over their "Writings and Discoveries." But unlike the traditional conception of the unregulated, unfettered commercial monopoly, the copyright and patent monopolies granted pursuant to the IP Clause are limited in both duration and scope, under the express terms of the clause itself.

27. U.S. CONST. art. I, § 8, cl. 8.

28. *Id.* art. I, § 8, cl. 8; *see also supra* note 17 and accompanying text. Professor Lawrence Lessig is a proponent of this view:

> [T]his clause is unique within the power-granting clause of Article I, section 8 of our Constitution. Every other clause granting power to Congress simply says Congress has the power to do something—for example, to regulate "commerce among the several states" or "declare War." But here, the "something" is something quite specific—to "promote . . . Progress"—through means that are also specific—by "securing" "exclusive Rights" (i.e., copyrights [and patents]) "for limited Times."

LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 215 (2004) (quoting U.S. CONST. art. I, § 8). Indeed, it formed an integral part of his argument for the petitioners in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Reply Brief for the Petitioners at 10, *Eldred*, 537 U.S. 186 (2002) (No. 01-618).

Professor Lawrence Lessig, "Like every other power in Article I, sec. 8, 'to promote the Progress of Science' is the [grammatical] object of 'Congress has the power . . . .' Removing that object renders the clause meaningless: 'Congress has the power . . . by securing for limited Times to Authors the exclusive Right to their Writings.'"[29]

Had the Framers desired to grant a different power, the other seventeen clauses in Article I, Section 8 are compelling evidence that they could have done so. Nothing prevented them from wording the clause to give Congress the power, for example, to secure for limited times to authors and inventors the exclusive right to their writings and inventions, in order to promote the progress of science and useful arts. They might even have said simply that "Congress shall have the power to grant patents and copyrights."[30] But that is not the language the Framers chose.

If the progress-promoting clause is correctly viewed as the IP Clause's grant of power, the monopoly-granting clause should then be viewed as the means by which Congress may exercise that grant of power.[31] The Framers and those of their generation reasoned that monopolies are generally an evil.[32] But in this one situation, properly limited, they provide a desirable outcome that an unfettered market in IP would otherwise fail to generate. Without legal protection, authors and inventors, protective of their revenues, might be inclined to seek nondisclosing solutions.[33] The grant of a period of exclusivity to authors and inventors promotes the release of their creations to the public, increasing the general storehouse of knowledge.

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29. Reply Brief for the Petitioners, *supra* note 28, at 10.

30. Jessica Talati, Comment, *Copyrighting Stage Directions & the Constitutional Mandate to "Promote the Progress of Science,"* 7 NW. J. TECH. & INTELL. PROP. 241, 250 (2009).

31. *See supra* note 28.

32. *See* Graham v. John Deere Co., 383 U.S. 1, 7 (1966) ("Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government.").

33. *See, e.g.*, BOYLE, *supra* note 23, at 251 ("[I]ntellectual property rights, like property rights in general, have a role after the innovation has occurred—facilitating its efficient exploitation, allowing inventors to disclose their inventions to prospective licensees without thereby losing control of them, and providing a state-constructed, neatly tied bundle of entitlements that can be efficiently traded in the market.").

If Congress's IP power extends only as far as the boundaries of the explicit grant in the IP Clause, and if the monopoly-granting clause is to be read as the required means of implementing that power, then that clause must also necessarily impose a limit on Congress's progress-promoting power.[34] Congress cannot, for example, grant an author or inventor an exclusive right for an *unlimited* time.[35] An important goal of the IP clause is the eventual release of works into the public domain, where they may serve as building blocks for future creativity. An unlimited monopoly would prevent works from reaching that goal.[36]

Determining the exact shape of the limitation this reading imposes on Congress's progress-promoting power, however, requires more than mere parsing. Here, there are two possible readings: first, that the monopoly-granting clause as a whole limits the progress-promoting power, or, second, that the clause contains a cluster of discrete limitations on the explicit means for exercising that power.[37]

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34. *See John Deere*, 383 U.S. at 5 ("The clause is both a grant of power and a limitation."). *But see infra* note 37.

35. *See* Eldred v. Ashcroft, 537 U.S. 186, 223 (2003) (Stevens, J., dissenting) ("But the requirement that [patent and copyright] grants be for 'limited Times' serves the ultimate purpose of promoting the 'Progress of Science and useful Arts' by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires." (quoting U.S. CONST. art. I, § 8, cl. 8)).

36. *See, e.g.*, BOYLE, *supra* note 23, at 11 ("[T]he goal of the system ought to be to give the monopoly only for as long as necessary to provide an incentive. After that, we should let the work fall into the public domain where all of us can use it, transform it, adapt it, build on it, republish it as we wish.").

37. Legal historian Edward Walterscheid advances a third possibility: that the monopoly-granting clause is "an explanation of, rather than a limitation on" the progress-promoting clause. Walterscheid, *supra* note 16, at 356. Although this reading purports to harmonize two Supreme Court readings of the clause, its defect is that it appears to require reading an additional word, "including," into the constitutional text. *Id.* at 357 (arguing that the clause should be interpreted to read, "Congress shall have Power . . . To promote the Progress of Science and useful Arts, [including] by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries" (alterations in original)).

1. *One View of the Monopoly-Granting Clause: Limiting in its Entirety.* One could view the monopoly-granting clause as a limit on the progress-promoting clause as a whole: that is, Congress has the power to promote progress, but may do so *only* by means of granting limited monopolies to authors and inventors.[38]

This reading is unsatisfactory. The primary and most convincing of the reasons for this is that the promotion of the "Progress of Science and useful Arts" is a policy the Framers presumably would have wanted Congress to pursue even if by means other than those it prescribed in this single clause, so long as those means were within the scope of one of Congress's other affirmative powers.[39] The IP Clause's placement with Congress's other affirmative powers in Article I, Section 8 is an indication that the clause should be read to increase those powers.[40] The Constitution places limits on Congress's enumerated powers in Article I, Section 9. For example, although Section 8 grants Congress the power to "regulate Commerce . . . among the several States,"[41] its regulation cannot include taxation of "Articles exported from any State."[42] Thus, a reading of the IP Clause that places a significant limit on one of Congress's other enumerated powers in order to achieve the clause's grant is inconsistent with its placement in Article I, Section 8.

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38. *See id.* at 355 ("[B]oth the Supreme Court and [the Federal Circuit's] own predecessor court, the Court of Customs and Patent Appeals . . . had earlier used language suggesting that promotion of the useful arts could in fact *only* occur through the patent and copyright systems.").

39. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); Walterscheid, *supra* note 16, at 351 ("[A] wide variety of other means than patents and copyrights were known for promoting the progress of science and useful arts. Little in the contemporaneous record points to any reason why the Framers would desire to preclude Congress from authority to use a wide variety of means to promote the progress of science and useful arts." (footnote omitted)); *see also* Walterscheid, *supra* note 16, at 352 ("[W]hile congressional authority to spend public monies is not absolute [under the General Welfare Clause], neither is it limited to the direct grants of legislative authority found in the Constitution.").

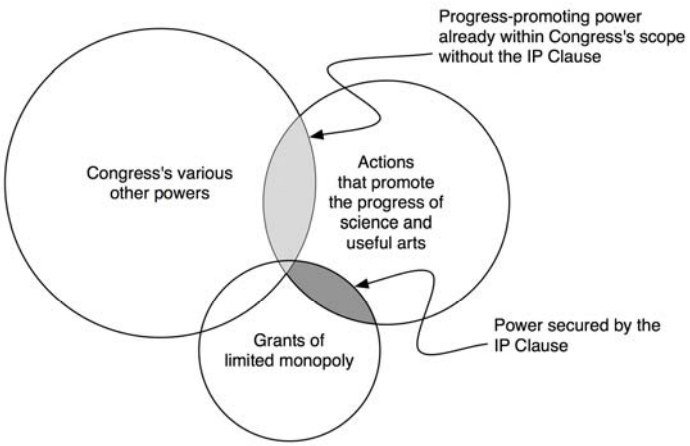
40. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 419–20 ("The ['necessary and proper'] clause is placed among the powers of Congress, not among the limitations on those powers. . . . Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.").

41. U.S. CONST. art. I, § 8, cl. 3.

42. *Id.* art. I, § 9, cl. 5.

In other words, the limiting-as-a-whole reading would secure the dark-gray area in Figure 1 by sacrificing the light-gray area; the better reading, as discussed below, is that the IP Clause grants the dark-gray area in addition to the light-gray area.

Figure 1. Reading the IP Clause



2. *A Better View of the Monopoly-Granting Clause: A Cluster of Discrete Limitations on the Exercise of the Enumerated Means.* Another possible view of the limit imposed by the monopoly-granting clause is that it places a cluster of discrete limitations on the exercise of the monopoly-granting means for exercising the progress-promoting power. In other words, if Congress wants to exercise its progress-promoting power using the monopoly-granting means—if it wishes to legislate in the dark-gray area in Figure 1—it must comply with a series of limitations such as the following:[43]

1. Congress may only secure copyright- and patent-style rights over "Writings and Discoveries."[44]
2. Congress may only secure copyright- and patent-style rights to "Authors and Inventors."[45]

43. This list is not meant to be exhaustive; other limitations are imposed by, for example, the definition of "securing" and "exclusive Right." *See id.* art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by *securing* for limited Times to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries" (emphases added)).

44. *Id.* art. I, § 8, cl. 8.

3. The grant of exclusive rights on a particular writing or discovery may go only to the author or inventor responsible for its creation.[46]
4. Congress may only grant these rights for "limited Times."[47]

This reading gives effect to the IP Clause's limitations while avoiding the undesirable elimination of progress-promoting activities that fall squarely within another of Congress's enumerated powers. Further, it hews more closely than does the earlier reading both to the plain meaning of the text and to the clause's placement with Congress's other affirmative powers in Article I, Section 8.

This second reading is not without problems, the primary one being that distinguishing exercises of the monopoly-granting power from exercises of other congressional powers is not always a simple task. Making the distinction is necessary, however, because Congress must determine whether it needs to comply with the restrictions in the IP Clause or with those of some other clause. Trademark, for example, is a monopoly grant of a type similar to those granted under the IP Clause, but the Supreme Court rightly held that trademark law is not a valid exercise of that clause because "it [does not] depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."[48] Further, the purpose of trademark law is to avoid unfair competition, not to promote progress. Federal trademark law is therefore an enactment under the Commerce Clause rather than the IP Clause, and the restrictions on Congress's power to enact trademark law are those of the Commerce Clause, not of the IP Clause.

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45. *Id.* art. I, § 8, cl. 8.

46. *Id.* art. I, § 8, cl. 8 (securing "the exclusive Right *to their respective* Writings and Discoveries" (emphasis added)).

47. *Id.* art. I, § 8, cl. 8.

48. Trade-Mark Cases, 100 U.S. 82, 94 (1879). The Court went on to hold that the trademark law as then enacted reached too far into intrastate commerce to be a valid exercise of Congress's Commerce Clause power. *Id.* at 96–97. Congress therefore made certain to delineate the limits of trademark protection in its subsequent trademark enactments. *E.g.*, Act of Feb. 20, 1905, ch. 592, 33 Stat. 724, *repealed by* Act of July 5, 1946, ch. 540, 60 Stat. 427 (allowing registration of a trademark "used in commerce with foreign nations, or among the several States, or with Indian tribes").

The universe of congressional enactments that lie on or near the line between monopoly-granting enactments and enactments under other congressional powers, however, is sufficiently small that any uncertainty in this area is likely to be viewed as a reasonable tradeoff as against other, more or less restrictive readings of the IP Clause. Core IP rights like those granted by the current patent[49] and copyright statutes[50] are clearly "exclusive Right[s]" in "Writings and Discoveries" being granted to "Authors and Inventors" for "limited Times." Only when Congress seeks to expand these rights do problems arise.[51]

B. Recent Interpretations of the IP Clause

Despite the text's limitations, Congress has largely ignored the limits of its IP Clause power.[52] In part, this is because courts have, either explicitly or implicitly, been reluctant to rein in Congress's more egregious excesses in this domain. This Section discusses the courts' responses first, then turns to Congress's.

1. *Courts.* Although the courts traditionally interpreted the progress-promoting clause as the grant of power in Article I, Section 8, Clause 8, the recent trend has been to give the progress-promoting clause short shrift.[53] This trend culminated in *Eldred v. Ashcroft*,[54] in which the Supreme Court dismissed the clause as "preambular language."[55] At a minimum, the *Eldred* Court may be described as receptive to the argument that the clause "places no substantive limit on Congress' legislative power," at least in the context of copyright.[56]

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49. 35 U.S.C. §§ 1–376 (2006).

50. 17 U.S.C. §§ 101–1332 (2006).

51. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (reasoning that further First Amendment scrutiny is unnecessary because the Copyright Term Extension Act does not alter the "traditional contours" of copyright (Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.)).

52. *See infra* Part I.B.2.

53. *See* Walterscheid, *supra* note 16, at 332–33 ("The traditional view, which has been voiced since the Constitution was ratified, is that the grant of power resides in the phrase 'To promote the progress of Science and useful Arts' . . . . An entirely different interpretation began to come into vogue in the second half of the twentieth century. According to this view, the 'to promote' language is merely a preamble which sets forth only a statement of purpose." (footnote omitted)).

54. Eldred v. Ashcroft, 537 U.S. 186 (2003).

55. *Id.* at 211.

56. *Id.* at 197. Here, the Court is referring without demur to the petitioners' "acknowledgment" regarding the "preamble." *Id.* Whether the petitioners were

In *Eldred*, seven Justices voted to uphold the constitutionality[57] of the Sonny Bono Copyright Term Extension Act (CTEA),[58] which extended the term of existing copyrights by twenty years, from life-of-the-author-plus-fifty-years to life-of-the-author-plus-seventy-years.[59] The Court's analysis of the extent of Congress's power under the IP Clause focuses almost exclusively on the "limited Times" language of the monopoly-granting clause, ignoring the issue of whether the CTEA promotes progress.[60]

Instead of reading the progress-promoting clause as a grant of power, the Court read it as the "end"[61] or the "objective"[62] to which Congress may legislate. This reading allowed the Court to avoid closely considering whether the CTEA actually promotes progress and instead to skip directly to a rational basis review of the CTEA, focusing on the "limited Times" language of the IP Clause—a review the Court performed with the usual extreme deference to Congress.[63] Justice Ginsburg's opinion for the Court concluded that the CTEA was a "rational exercise of the legislative authority conferred by the [IP] Clause"[64] without once stating what that legislative authority might be.

The Court concluded that, by enacting the CTEA, Congress had effectuated "the ends of the Clause"[65] and "the constitutional aim."[66]

"acknowledg[ing]" any such thing is not so cut-and-dried as the Court makes it sound, however. *See* Reply Brief for the Petitioners, *supra* note 28, at 10–11 (arguing that the "grant of power"—that is, the progress-promoting clause—has "[i]nterpretive [e]ffect").

57. *Eldred*, 537 U.S. at 222. Justices Stevens and Breyer dissented. *Id.* at 222 (Stevens, J., dissenting); *id.* at 242 (Breyer, J., dissenting). Justice Stevens, at least, appears to have had the limitations imposed by the progress-promoting clause in mind. *See id.* at 223 (Stevens, J., dissenting).

58. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

59. *Eldred*, 537 U.S. at 193.

60. *Id.* at 200–01.

61. *Id.* at 211.

62. *Id.*

63. *Id.* at 200 ("To comprehend the scope of Congress' power under the Copyright Clause, 'a page of history is worth a volume of logic.' History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions . . . . Since then, Congress has regularly applied duration extensions to both existing and future copyrights." (citation omitted) (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921))). Justice Breyer argued forcefully in dissent that, even under this permissive standard, the CTEA does not pass muster. *Id.* at 266–67 (Breyer, J., dissenting).

64. *Id.* at 204–06 (majority opinion).

65. *Id.* at 222.

66. *Id.* (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)).

Even assuming that this "ends" and "aim" language refers to the progress-promoting clause,[67] the Court here failed to accord that clause its correct weight: the clause is not merely the "ends," an "aim," or an "objective;"[68] it is rather the grant of power itself.[69] Congress may come up short of its ends, miss its aim, or fail to secure its objective. It may not exceed its power.

Echoes of *Eldred* can be found in *District of Columbia v. Heller*,[70] in which the Court described the "prefatory clause" of the Second Amendment as merely "announc[ing] a purpose" for the Amendment's "operative clause."[71] The two situations, however, are not analogous. The structure of the IP Clause is not like that of the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[72] Extraneous commas notwithstanding, the Court's reading of the Second Amendment is convincing: a main clause ("the right of the people to keep and bear arms[] shall not be infringed") with a purposive, preambular subordinate clause ("[a] well regulated militia[] being necessary to the security of a free state"). The prevailing reading of the IP Clause, by contrast, would turn what is grammatically the main clause into a preamble and the subordinate clause into the operative one. Worse, this judicial act of constitutional editing defies the often-announced canon of construction that an unambiguous statement means what it says on its face.[73]

One commentator has viewed the *Eldred* Court's treatment of the progress-promoting clause as the latest, regrettable stage in what is only a fairly recent evolution away from the plain meaning of the IP

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67. *See id.* at 212 ("'[T]he primary objective of copyright' is '[t]o promote the Progress of Science.' The 'constitutional command,' we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'" (citation omitted) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991))).

68. *Id.*

69. *See supra* Part I.A.

70. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

71. *Id.* at 2789; *see also id.* ("That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause . . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

72. U.S. CONST. amend. II.

73. *E.g.*, Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" (quoting TVA v. Hill, 437 U.S. 153, 187 n.33 (1978))).

Clause's text.[74] But it is not clear that the Court has, at least in recent memory, applied the more stringent view of the IP Clause when discussing copyright. The Supreme Court's reading of the clause in the context of patent, however, hews closer to the text. In the patent case *Graham v. John Deere Co. of Kansas City*,[75] the Court recognized the progress-promoting clause as a hard limit on the exercise of congressional power: "The [IP] clause is both a grant of power and a limitation. This qualified authority . . . is limited to the promotion of advances in the 'useful arts.' . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."[76] In treating the progress-promoting clause as a restraint that Congress may not overreach, the Court more closely approached the spirit of the IP Clause, if not its actual force.[77] Six years later, in the 1972 patent case *Deepsouth Packing Co. v. Laitram Corp.*,[78] the Court stated simply that "[t]he direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts."[79] These statements are a far cry from the *Eldred* Court's avoidance of the subject two decades later.

It is unclear how much weight the Court gives to its patent jurisprudence when considering copyright. But in *Eldred*, the Court looked beyond its own recent patent-related holdings and focused on congressional history: "[b]ecause the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry."[80] Although none of this is conclusive, the case law suggests that Supreme Court jurisprudence interpreting the IP Clause with regard to copyright is now on a separate track from that interpreting the same clause with regard to patent.

Lower courts have scarcely been any friendlier to a plain-language reading of the IP Clause. For example, before *Eldred*

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74. *See* Walterscheid, *supra* note 16, at 332–33 ("An entirely different interpretation began to come into vogue in the second half of the twentieth century. According to this view, the 'to promote' language is merely a preamble which sets forth only a statement of purpose." (footnote omitted)).

75. Graham v. John Deere Co., 383 U.S. 1 (1966).

76. *Id.* at 5–6.

77. For the argument that even this conception of Congress's power is insufficient to meet constitutional requirements, see *infra* Part II.

78. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972).

79. *Id.* at 530.

80. Eldred v. Ashcroft, 537 U.S. 186, 201 (2003).

reached the Supreme Court, the D.C. Circuit ruled against the *Eldred* petitioners in *Eldred v. Reno*[81] and went even further than the Supreme Court, affirmatively calling the progress-promoting clause a "preambular statement of purpose[]"[82] and drawing a distinction between it and the "substantive grant of power."[83]

Courts at least have the excuse that they must in general look to the arguments presented by the parties in the matters before them. Congress faces no such limitations and boasts far-reaching factfinding powers; yet its enactments lie at the root of the overreaching that characterizes the current state of U.S. IP law.

2. *Congress.* In other areas, Congress has demonstrated that it knows how to impose proper limits on its legislation. For example, the language of the federal kidnapping statute,[84] enacted in part pursuant to the Commerce Clause,[85] provides in relevant part that

> [w]hoever unlawfully seizes . . . and holds for ransom or reward or otherwise any person, . . . when . . . the person is willfully *transported in interstate or foreign commerce*, . . . or the offender *travels in interstate or foreign commerce* or uses . . . *any means, facility, or instrumentality of interstate or foreign commerce* in committing or in furtherance of the commission of the offense . . . shall be punished by imprisonment for any term of years or for life . . . .[86]

Congress here uses explicit and specific language to avoid legislating beyond that clause's bounds, using "interstate or foreign commerce" as a limiting factor three distinct times in the course of a single sentence.[87]

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81. Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).

82. *Id.* at 377.

83. *Id.* at 378 ("[A]lthough the plaintiffs claim that *Feist* supports using the preamble to interpret the rest of the Clause, the Court in *Feist* never suggests that the preamble informs its interpretation of the substantive grant of power to the Congress (which there turned upon the meaning of 'Authors' and of 'Writings,' each standing alone)." (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–47 (1991))). *But see id.* at 381 (Sentelle, J., dissenting) ("That clause empowers the Congress to do one thing, and one thing only. That one thing is 'to promote the progress of science and useful arts.' . . . The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress.").

84. 18 U.S.C. § 1201 (2006).

85. U.S. CONST. art. I, § 8, cl. 3.

86. 18 U.S.C. § 1201(a) (emphasis added).

87. *Id.*

Similarly, the first Congress included limiting language in the Copyright Act of 1790,[88] which extended to "maps, charts, and books" and was explicitly an "Act for the encouragement of learning."[89] But Congress's intent in passing the Copyright Act of 1976[90] appears much different. Although Congress passed the Act pursuant to the IP Clause, any limitations are seemingly absent. Instead, the law begins with a statement that the limited copyright monopoly "subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[91] This Act conspicuously lacks any requirement that the "original work[] of authorship"[92] "promote the Progress of Science and useful Arts,"[93] or even that the statute be interpreted with Congress's progress-promoting power in mind. Indeed, there is no indication anywhere in the statute's language that Congress has considered itself limited by its stated grant of power.

3. *A Principled View?* If the trend has been to treat the IP Clause simply as a monopoly-granting clause with some meaningless surplusage tacked onto its front, surely those adhering to this interpretation have reasons for doing so. One possible reason for the courts' behavior is that, by and large, they limit themselves to ruling on the arguments presented to them, and even those attorneys who advocate these or similar positions in their scholarship are reluctant to do so in their briefs and arguments.[94]

Congress's motives—frequently influenced by industry lobbying—have not always been faithful to the constitutional text. The Congress that passed the CTEA, for example, seems to have been motivated in no small part by a few members' desire to extend

88. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

89. *Id.*

90. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

91. 17 U.S.C. § 102(a) (2006).

92. *Id.*

93. U.S. CONST. art. I, § 8, cl. 8.

94. *See, e.g.*, Walterscheid, *supra* note 16, at 337 (describing Professor Lessig's reluctance to raise the argument that the progress-promoting clause places an "independent, substantive limitation on the power of [C]ongress . . . . because it was unnecessary and seemed to open up all sorts of new and unmanageable judicial review" (quoting private communication from Lawrence Lessig to author (July 26, 2003))).

copyright terms as far as possible without falling afoul of the "limited Times" provision.[95] Further, Congress has appeared susceptible to lobbying pressure from industry groups like the Motion Picture Association of America (MPAA) and its music-industry counterpart, the Recording Industry Association of America (RIAA),[96] which push for increased—and not obviously progress-promoting—protections, to the detriment of Congress's constitutional responsibilities.[97]

II. INTERPRETING THE GRANT OF POWER: WHAT DOES IT MEAN TO "[P]ROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS"?

Practices that fall outside the constitutional mandate to promote progress are outside of Congress's power. Without a clear method for determining whether a given piece of legislation falls within that mandate, however, it would be futile to demand that Congress or the courts remain within the IP Clause's bounds. This Part provides a principled means for determining whether a given piece of legislation "promote[s] the Progress of Science and useful Arts," a determination that, though difficult, is not impossible.

A. What Does "[P]romote the Progress" Mean?

Because Congress has the power to "promote the Progress of Science and useful Arts," it is necessary to parse the words in the grant to understand the nature and extent of the limitations those words impose. "Science and useful Arts" are broad terms that encompass all types of knowledge[98] and invention;[99] the limitations

95. *See* Eldred v. Ashcroft, 537 U.S. 186, 256 (2003) (Breyer, J., dissenting) (pointing to the statements of several members of Congress—including those of Representative Sonny Bono and his widow, Representative Mary Bono Mack—that urge perpetual copyright terms).

96. The MPAA and RIAA regularly spend millions of dollars a year lobbying Congress. Bruce Gain, *Special Report: Music Industry's Lavish Lobbying Campaign for Digital Rights*, INTELL. PROP. WATCH (Jan. 6, 2011, 4:38 PM), http://www.ip-watch.org/weblog/2011/01/06/special-report-music-industrys-lavish-lobby-campaign-for-digital-rights; *MPAA Spent $520K in 3Q Lobbying Federal Govt*, YAHOO! FIN. (Dec. 16, 2010, 5:11 PM EST), http://finance.yahoo.com/news/MPAA-spent-520K-in-3Q-apf-813283816.html.

97. *See supra* note 7.

98. *See supra* note 24.

99. *See* 35 U.S.C. § 101 (2006) ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore . . . ."); Diamond v. Chakrabarty, 447 U.S. 303, 309 (1979) (stating that patentable subject matter includes "anything under the sun that is made by man" (quoting S. REP. NO. 82-1979, at 5 (1952))).

imposed by the progress-promoting clause, therefore, must come, if at all, from the definitions of "promote" and "Progress." Based on the definitions of those terms, the courts and Congress should determine whether a given enactment promotes progress by answering the following three questions:

1. Is it reasonable to believe that the law will encourage an increase in the quality or quantity of knowledge?
2. Is it reasonable to believe that the law will encourage the dissemination of knowledge?
3. Is it reasonable to believe that the encouragement this law provides either to the increase of knowledge or to the dissemination of knowledge will be an improvement over the encouragement provided by existing laws?

1. *"Progress."* Several definitions of "Progress" have emerged over the past decade. One view sees progress in terms of qualitative advancement: the progress of knowledge is promoted by those works and activities that increase knowledge both in kind and in amount.[100] A second view, which its adherents claim hews closer to the Framers' understanding of the term, conceives of progress as a physical motion, which, in the context of IP, connotes the dissemination or spread of knowledge.[101] Though based on solid historical and linguistic evidence,[102] this interpretation is strained because it excludes much of what both our generation considers and the Framers' considered to be part of "Progress."[103] Each of these first two views is an attempt to provide a principled limit to the discretion vested in Congress under the IP Clause by limiting the purposes to which Congress may apply its progress-promoting power.[104]

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100. *E.g.*, Walterscheid, *supra* note 16, at 374 ("[Progress] meant . . . the idea of advancement in science and the useful arts, including through the efforts of writers and inventors in creating new writings and finding out new discoveries of a utilitarian nature. . . . [T]he Clause was intended to provide an incentive for advances in science and the useful arts through encouragement of the intellectual efforts of writers and inventors.").

101. *E.g.*, Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755 (2001).

102. *Id.* at 799–809.

103. Walterscheid, *supra* note 16, at 374 ("[O]ne of the dictionary definitions of 'progress' at the end of the eighteenth century was 'intellectual improvement; intellectual advancement' . . . .").

104. *See infra* Part II.A.2.

A third position combines the previous two, asserting that "Progress" may be either qualitative advancement or dissemination of knowledge.[105] Additionally, the commentators advancing this reading include the preservation of existing works within the concept of dissemination.[106] Unlike the previous two definitions, this disjunctive test does little work; indeed, under it, "it is unclear in what manner the 'to promote' language actually constrains the copyright power of Congress."[107] The inclusion of "encouraging the . . . preservation of existing works"[108] as an independently sufficient condition for a finding that Congress is "promot[ing] the Progress" provides few constraints on congressional action. If it limits Congress at all, in fact, it does so only by forbidding Congress from actively seeking the destruction of existing works in its copyright laws.[109]

A better reading is that "Progress" requires *both* qualitative advancement *and* dissemination.[110] A work that advances knowledge in some field but is not disseminated cannot be said to have promoted

105. Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1 (2002).

106. *See id.* at 3 n.10 (advancing the argument that "[copyright-term] extension 'give[s] copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration'" and is therefore "'plainly adapted' and 'appropriate' to 'promot[ing] progress'" (quoting Eldred v. Reno, 239 F.3d 372, 378–79 (D.C. Cir. 2001))).

107. Walterscheid, *supra* note 16, at 377.

108. Hatch & Lee, *supra* note 105, at 23.

109. As absurd as the idea sounds that Congress might intentionally choose to destroy existing works, there is evidence that the CTEA has done exactly that. Before enacting the CTEA, Congress heard from film historians that the Act would hinder or prevent the efforts of film preservationists to save films that are stored on old film stock. *E.g.*, Letter from Larry Urbanski, Chairman, Am. Film Heritage Ass'n, to Sen. Strom Thurmond (Mar. 31, 1997), *available at* http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/letters/AFH.html.

110. *Cf.* Eldred v. Ashcroft, 537 U.S. 186, 244 (2003) (Breyer, J., dissenting) ("The Copyright Clause and the First Amendment seek related objectives—the creation *and* dissemination of information." (emphasis added)); Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act,* 36 LOY. L.A. L. REV. 337, 355–56 (2002) ("[T]he creation *and* dissemination" of "knowledge ('Science'), technology ('useful Arts'), writings, and discoveries" are "necessary to the continued viability of a republican polity."); Walterscheid, *supra* note 16, at 376 (suggesting that Pollack's language, possibly indicating a shift toward including "both creation and dissemination," leaves them "in basic agreement as to the interpretation to be given to 'Progress.'"). *But see* Walterscheid, *supra* note 16, at 374 ("I suggest that it meant, and was intended to mean, the idea of advancement in science and the useful arts, including through the efforts of writers and inventors in creating new writings and finding out new discoveries of a utilitarian nature. That is to say, the Clause was intended to provide an incentive for advances in science and the useful arts through encouragement of the intellectual efforts of writers and inventors.").

progress in any meaningful sense.[111] Similarly, a work that is disseminated among the masses but that does not expand the boundaries of knowledge is not progress promoting.

Therefore, Congress and the courts should begin by asking, first, whether it is reasonable to believe that a copyright enactment under consideration will encourage an increase in the quality or quantity of knowledge, and, second, whether it is reasonable to believe that the law will encourage the dissemination of that knowledge. To find that the law promotes progress, the questioner must answer both questions in the affirmative.[112]

2. *"Promote."* Although a great deal more scholarly attention focuses on what "Progress" means,[113] the Supreme Court has weighed in instead on how to define "promote," stating that it means "to stimulate, to encourage, or to induce."[114] But "promote"—like "Progress"—also includes connotations of forward motion or advancement.[115]

It is consistent with both readings to require that, when Congress legislates pursuant to the IP Clause, its legislation must offer some

111. *See* Gayler v. Wilder, 51 U.S. (10 How.) 477, 497 (1850) ("If the foreign invention had been printed or patented, it was already given to the world and open to the people of this country, as well as of others, upon reasonable inquiry. They would therefore derive no advantage from the invention here. It would confer no benefit upon the community, and the inventor therefore is not considered to be entitled to the reward. But if the foreign discovery is not patented, nor described in any printed publication, it might be known and used in remote places for ages, and the people of this country be unable to profit by it. The means of obtaining knowledge would not be within their reach; and, as far as their interest is concerned, it would be the same thing as if the improvement had never been discovered.").

112. In this analysis, it is important to separate the law from the work it protects. A law may promote progress without requiring that the works it protects push back the boundaries of knowledge. Indeed, it is difficult to imagine a law that encourages experimentation—and thus promotes progress—without offering protection to a wide variety of works. First, the work's author may not be the best judge of the work's progress-promoting qualities, and, second, those qualities may not become apparent until later in the work's life cycle. *See, e.g.*, Alan Friedman, *A Sad and Funny Story*, N.Y. TIMES, June 22, 1980, § 7 (book review), at 2 (describing the tortured publication history of John Kennedy Toole's posthumously published novel *A Confederacy of Dunces*).

113. *See supra* Part II.A.1.

114. Goldstein v. California, 412 U.S. 546, 555 (1973) (internal quotation marks omitted).

115. 12 THE OXFORD ENGLISH DICTIONARY, *supra* note 24, at 616. It is also perhaps notable that the Framers chose the "to promote" language over language that specifically included the term "encourage." Walterscheid, *supra* note 16, at 341 ("Madison's notes indicate that among those submitted by him [was] . . . 'To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.'").

modicum of improvement of the incentives to progress over those provided by current legislation.

A piece of legislation that reduces incentives to progress cannot, de facto, be called a promotion of progress. More subtly, a piece of legislation that merely keeps to existing levels of encouragement cannot be said to "promote . . . Progress" either, but rather merely to continue or maintain it. Put differently, an incentive—a device "to stimulate, to encourage, or to induce"—provides a spur where none existed before or where the existing one was insufficient to generate the desired behavior.

Thus, the third question that the courts and Congress should ask about any given piece of IP legislation is whether it is reasonable to believe that the encouragement the law will provide either to the increase or the dissemination of knowledge will be an improvement over the encouragement provided by existing laws.

These three questions provide Congress and the courts with a framework for analyzing the constitutionality of IP enactments under the IP Clause. The next Part suggests how the framework might be put into use.

III. LIMITING THE DAMAGE: A JUDICIAL SOLUTION?

There is no one-size-fits-all solution to the problems outlined in this Note. Righting the direction of IP policy in the United States will require concerted efforts by both the legislature and the judiciary. That cooperation is, concededly, unlikely. Still, either branch acting alone could make significant inroads against overreaching IP enactments, as this Part will show.

Congress has a wide variety of potential solutions at its fingertips should it decide to comply with the constitutional mandate that it "promote the Progress of Science and useful Arts" in its IP enactments.[116] One relatively simple solution would be to amend the Copyright and Patent Acts with a mandate that courts limit their

116. *E.g.*, Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007 (FAIR USE), H.R. 1201, 110th Cong. (2007) (proposing to strengthen fair use and restore common-sense consumer rights to make use of copies of the copyrighted works that they have purchased); Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2005, H.R. 4536, 109th Cong. (2005) (same).

enforcement of those acts to cases that promote progress.[117] Another, more adventurous—and therefore less likely—solution would be to embed sunset provisions in new copyright legislation, describing Congress's belief that the legislation will promote progress but invalidating the law if certain empirical targets—for example, measuring the growth of research or writings in specified areas of scholarship or literature—are not met.[118]

The courts, for their part, should respond to laws that overreach Congress's power with two measures. First, they should reject any further expansions of copyright law that cannot be shown to "promote the Progress of Science and useful Arts." Second, they should limit the application of current copyright laws by reading in a requirement that any application of a copyright or patent statute "promote the Progress of Science and useful Arts." An ideal solution would involve findings of as-applied or even facial unconstitutionality for some of the most recent copyright-related enactments. Such holdings, however, would buck precedent—including *Eldred*—and therefore lower courts' hands are effectively tied.

A. A Fifth Fair-Use Factor: Balancing Progress-Promoting Values

This is not to say, however, that courts' quivers are empty when they see parties urging applications of copyright or copyright-related laws that are progress-retarding or progress-neutral. Courts may rule that an alleged infringer whose use is more progress-promoting than the allegedly infringed copyright is instead making a fair use of the copyrighted material.

Section 107 of the 1976 Copyright Act states that "the fair use of a copyrighted work . . . is not an infringement of copyright."[119] Hence, a person making a fair use of a copyright holder's work is not liable to that copyright holder.[120] Section 107 does not offer a definition of fair use; instead, it provides two sets of tools to guide the court in its analysis of whether an otherwise infringing use should be considered

117. Compare *supra* notes 84–87 and accompanying text, describing the internal limitations placed on the federal kidnapping statute by Congress in an attempt to remain within its Commerce Clause power.

118. *Cf.* 17 U.S.C. § 1201(a)(1)(C) (2006) (providing that the Librarian of Congress may grant three-year exemptions from the strictures of the anticircumvention provisions of the DMCA to certain classes of copyrighted works, subject to a five-factor determination including several empirical or quasi-empirical findings).

119. 17 U.S.C. § 107 (2006).

120. *See id.*

noninfringing. The first tool is a nonexclusive[121] list of "purposes" to which a fair use might be put: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[122] This list does little work beyond putting courts on notice concerning the kinds of uses that might be (but sometimes are not[123]) fair.

The second tool is a nonexclusive[124] list of four factors that courts must consider "in determining whether the use . . . is a fair use":[125]

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[126]

The fair-use doctrine has aptly been described as "the duct tape of the copyright system,"[127] in part because it offers courts a remedy for situations in which the literal application of a copyright law would lead to an absurd or undesirable result.[128] Pressing fair use into service

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121. *Id.* (suggesting that certain uses are noninfringing when they are "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship or research").

122. *Id.*

123. *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (holding that § 107 "does not provide blanket immunity for 'multiple copies for classroom use'").

124. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (stating that "[t]he factors enumerated in the section are not meant to be exclusive" but are "especially relevant"); *see also* 17 U.S.C. § 107 ("[T]he factors to be considered shall include [the four factors].").

125. 17 U.S.C. § 107.

126. *Id.* § 107(1)–(4).

127. BOYLE, *supra* note 23, at 120.

128. *E.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451–55 (1983) (holding that unauthorized time-shifting of copyrighted telecasts using a videocassette recorder—though it is technically a violation of a copyright owner's § 106 rights—is a fair use, because it is noncommercial and causes little or no harm). Whenever a scholar, critic, or student quotes another work, he would—but for the fair use defense—risk copyright liability, because quotation is a "reproduc[tion of] the copyrighted work." 17 U.S.C. § 106(1). Fair use also

to ensure that copyright promotes progress is not a new idea;[129] indeed, as the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*,[130] the doctrine's goal is to "fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"[131] Courts are admonished to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[132] Instead, courts must weigh the enumerated factors "in light of the purposes of copyright."[133] Neither *Acuff-Rose* nor previous scholarship in this direction, however, has provided the courts with sufficient guidance in balancing the relevant concerns.[134]

Judges should therefore apply a fifth fair-use factor, making explicit the weighing of the progress-promoting clause with respect to the work of each of the parties. Thus, in addition to the other four factors, courts should consider the effect of the alleged infringer's use on the promotion of the progress of science and useful arts, and whether that use better serves the progress-promoting purpose than does enforcement of the copyright holder's rights over the copyrighted work. To determine the relative levels of progress promotion, courts should look at each use with the three questions from Part II.A in mind.

In conducting this analysis, courts should balance the use of the work against the progress-promoting value of enforcing the copyright holder's rights, rather than simply looking at the progress-promoting value—if any—of the work itself. Two uses of the same work might have different progress-promoting values. For example, verbatim copying for one's own personal use is less likely to promote progress

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generally protects the professor who hands out in-class photocopies for her students. *Id.* § 107 ("[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright."). *But see Princeton Univ. Press*, 99 F.3d at 1393 (rejecting defendants' fair use defense of the creation of "coursepacks," which contained photocopies of professor-selected readings for use by those professors' students).

129. *See* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1839–40 (2006) ("In certain cases it would be desirable, and indeed natural, to ask whether the examined use promotes the progress of knowledge or not.").

130. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

131. *Id.* at 575 (quoting U.S. CONST. art. I, § 8, cl. 8).

132. *Id.* at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

133. *Id.* at 578.

134. *See* Oliar, *supra* note 129, at 1839–40 (suggesting that the Ninth Circuit could have "recognize[d] the constitutional purpose of the copyright system as a fifth relevant fair use factor" in deciding *Kelly v. Arriba*, 336 F.3d 811 (9th Cir. 2003)).

than is the creation of a derivative work. In making that assessment, courts need not determine whether the work being copied makes a significant advancement of human knowledge.

There are two situations in which a court could find that this fifth fair-use factor favors the alleged infringer. In the first situation, enforcement of the copyright holder's rights is progress retarding or progress neutral, and the alleged infringer's use is progress promoting. In such a situation,[135] this proposed new factor should be tied to a strong presumption that the alleged infringer's use is fair, a presumption rebuttable only by a finding that all four of the other factors weigh against fair use. The addition of a presumption to the fair-use weighing test is within the bounds of accepted fair-use analysis: in 1983, the Supreme Court effectively added a presumption to the first fair-use factor with its statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[136] Moreover, if Congress's power extends only to progress-promoting enactments, the addition of this presumption to the fair-use-factor analysis would help ensure that the application of copyright law hews to constitutional limitations, even if the law itself does not.

The second situation in which a court might find that the new factor favors the alleged infringer is when the copyright holder's use is progress promoting, but the alleged infringer's use is clearly more so.[137] Because the underlying copyright is progress promoting—thus satisfying the constitutional requirements for copyright and therefore making the use a fit subject for congressional legislation—the proposed new factor should be treated as equal in weight to the other four, with no presumption tied to it. This reduction in significance balances the consideration that the progress-promoting clause contains no requirement that Congress promote progress by the best means available against the consideration that a court should accord some weight to a use's more efficient or effective promotion of progress.

Although finding fair use where the alleged infringer's use promotes progress to a greater extent than the enforcement of the copyright holder's copyright is perhaps the most helpful of an unlikely range of judicial solutions, it is by no means a perfect one. One major

135. *See infra* Part III.C.

136. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1983).

137. *See infra* Part III.C.

difficulty from the perspective of an alleged infringer hoping to rely on fair use—and especially on an expanded conception of fair use—is that, procedurally, fair use is often raised at trial as the only viable defense to what is otherwise clear infringement.[138] Thus, the alleged infringer labors under the threat of litigation, and uncertainty about her rights as against those of the copyright holder may cause her to avoid making use of the work at all—even if her intended use would, in all probability, be ruled a fair one.

Another challenge is that the question of what promotes progress is by its nature a difficult determination.[139] Indeed, this is likely one reason why the courts have hitherto been squeamish about enforcing the progress-promoting clause as a substantive limitation on Congress's power. This Note has argued that there is a principled means for making that determination; however, the burden of doing so might more fairly be placed on an appellate court reviewing the constitutionality of a piece of legislation than on a trial court adjudicating a dispute over whether a given use is fair. A third, and related, problem is the potential increase in both the frequency and difficulty of litigation, further straining the courts' already-strained dockets and budgets.

One response to these last two difficulties is that the explicit review of progress promotion is only a short step from the analysis that courts are supposed to perform in every fair-use determination under current precedent. Courts are to explore all four of the statutory factors and "weigh[them] together[] in light of the purposes of copyright."[140] If the *Acuff-Rose* Court intended for that directive to have some substantive effect, then the fair-use reviewing court must already consider to some extent the progress-promoting values of both the allegedly infringing use and the underlying copyright.

B. Promoting Progress in the Aggregate

Applying this fifth fair-use factor would allow attorneys representing alleged infringers to argue that, in the aggregate, individual acts of what would otherwise be copyright infringement

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138. *See, e.g.*, *Acuff-Rose*, 510 U.S. at 574 ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman' under the Copyright Act of 1976, but for a finding of fair use through parody." (citation omitted)).

139. *See supra* Part II.

140. *Acuff-Rose*, 510 U.S. at 578.

can promote progress better than can the enforcement, against all alleged infringers, of the underlying copyright.

In the 1942 Commerce Clause case *Wickard v. Filburn*,[141] the Supreme Court held that Congress could legislate in a manner that reached individual farmers' use of their own wheat, despite its purely intrastate nature.[142] Key to this determination was the finding that although "appellee's own contribution to the demand for wheat may be trivial by itself[, that] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[143]

Just as individual, intrastate acts can have a judicially and congressionally cognizable negative effect on interstate commerce, individual acts of alleged copyright infringement can have a judicially cognizable positive effect on progress.[144] The collective action of, for example, a million individuals adopting a disruptive new technology (be it the VCR or peer-to-peer file-sharing software) places pressure on the industries involved to adapt and innovate[145]—the kind of "Progress" the Framers thought Congress should promote. In such situations, and especially when faced with an enactment that has been shown to be contrary to innovation in some of its applications, a judge reviewing the individual adopter's case should consider a finding of fair use.

One objection to this proposal is that it costs copyright holders profits. For example, the RIAA has alleged billions of dollars in

141. Wickard v. Filburn, 317 U.S. 111 (1942).

142. *Id.* at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

143. *Id.* at 127–28; *see also* Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("When Congress decides that the 'total incidence' of a practice poses a threat to the national market, it may regulate the entire class." (citation omitted)).

144. This argument, although similar to that in *Wickard*, is perhaps better viewed as its mirror image. In *Wickard*, the individual's activity, when considered in a collective context, placed him within the bounds of Congress's affirmative constitutional reach. *Wickard*, 317 U.S. at 127–28. Here, by contrast, the individual's activity, when considered in a collective context, may place him outside the enforceable bounds of a congressional enactment.

145. *See* PATRY, *supra* note 5, at 4 ("History has proved repeatedly that there is no genuine choice when businesses are faced with a new product that gives consumers what they want. Failure to adapt is fatal even to well-managed market leaders that stay in close touch with their customers.").

losses due to peer-to-peer file sharing.[146] The courts must remember that activities that limit profits may retard progress, but the one does not imply the other. The RIAA's losses, even if proved, are not directly relevant to the question of progress promotion. Peer-to-peer file sharing has promoted progress both by directly increasing the dissemination of knowledge[147] and by advancing the technical means by which knowledge can be disseminated through the impetus to create ever more efficient and decentralized networks. The loss of recording-industry profits would be relevant to the question of progress promotion only insofar as that loss has generated a decline in the amount or quality of music being produced. So long as the income still being generated is sufficient to create incentives for new work, the constitutional requirement of progress promotion is satisfied.

C. Effects of Expanding Fair Use

Addition of this fifth fair-use factor would have a destabilizing effect on many existing copyrights. But because the fair-use analysis is dependent on individualized determinations, the effect will necessarily be restricted to those situations in which courts find uses to be fair.

One area in which the proposed fifth factor would make a significant difference is in the use of orphan works. An orphan work is a work that is presumptively under copyright, but for which no copyright holder is known or can be located.[148] The problem of orphan works results from a combination of automatic copyright protection with ever-lengthening copyright terms that extend well beyond an author's lifespan.[149] Under previous incarnations of the Copyright Act, many of these works would be in the public domain, either because their terms had expired or because the original author did not register the copyright and therefore did not receive copyright

146. *Piracy: On-line and On the Street*, RIAA, http://www.riaa.com/physicalpiracy.php (last visited Mar. 3, 2011).

147. *See supra* text accompanying note 110.

148. Notice of Inquiry, 70 Fed. Reg. 3739, 3739 (Jan. 26, 2005) (defining "orphan works" as "copyrighted works whose owners are difficult or even impossible to locate").

149. *See id.* at 3740 ("The legislative history to the 1976 [Copyright] Act reflects Congress' recognition of the concern raised by some that eliminating renewal requirements would take a large number of works out of the public domain and that for a number of those older works it might be difficult or impossible to identify the copyright owner in order to obtain permissions.").

protection. Under the 1978 Act—which grants automatic protection upon the work's fixation and which, as amended, now protects the work for the life of the author plus seventy years—it is likely that a work created in the second half of the twentieth century will not enter the public domain until the end of the twenty-first.[150] Orphan works—those that have fallen through the cracks—cannot legally be reproduced, because to do so without authorization is a violation of the author's rights under § 106 of the Copyright Act.[151] And because the works are orphaned, no author can be petitioned for a license or other permission to reproduce the work. These works represent a rich vein of culture that might provide education and entertainment to a new audience, or that artists and authors could mine for use in their own derivative works.

Any use of an otherwise-unused orphan work—either its direct reproduction for distribution or its use in a derivative work—is likely to promote both the advancement and the spread of knowledge to a significantly greater degree than the protection of an unknown author's right to prevent reproduction. Indeed, orphan works languish in archives and on bookshelves, often stored in deteriorating media.[152]

Imagine that a publishing house comes into possession of an anonymous, unpublished novel of great cultural significance, written at some point in the 1960s. The publishing house could publish the book, gambling that the original owner is unlikely to step forward at this late date.[153] But, under the law as it currently exists, if the author

150. A work created in 1960 by an author who was twenty-five at the time and who dies at age eighty (in 2015) will not enter the public domain until 2085—assuming no further extensions of the copyright term. Given the recent history of congressional practice in this area, that is probably not a safe assumption to make.

151. 17 U.S.C. § 106(1) (2006) ("[T]he owner of copyright . . . has the exclusive right[] . . . to reproduce the copyrighted work in copies . . . .").

152. *E.g.*, Pamela Brannon, Note, *Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works*, 14 J. INTELL. PROP. L. 145, 146 (2006) (describing the problems faced by the owner of a collection of copyrighted Apple II software, which is stored on magnetic media that have become unreadable).

153. This is, in fact, quite similar to the task undertaken by the Google Books project, Google's attempt to digitize all printed material and render it searchable. The Authors' Guild sued Google. Complaint, Authors Guild v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005), *available at* http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/authors-guild-v-google/Authors Guild v Google 09202005.pdf. After several years of legal wrangling, Google and the Authors' Guild, along with the Association of American Publishers, announced a settlement under which Google would pay $125 million in exchange for certain use licenses, including those regarding orphan works. Stephanie Condon, *Google*

did then step forward, the publisher could be on the hook for millions of dollars in statutory damages—a calculus no corporate attorney is likely to approve. Under current law, the use made by the publisher would almost certainly not be considered fair because the first three fair-use factors weigh heavily against a finding of fair use.[154]

In this situation, however, a reviewing court would almost certainly find that the proposed fifth factor weighs in favor of a finding of fair use, because enforcement of the copyright holder's copyright—as against the publisher[155]—would likely be progress-retarding, or at best progress-neutral. This finding would raise a presumption that the use was fair. And under this Note's proposed framework, even a finding that the first three factors hewed against finding the use fair would still be insufficient to overcome the fair-use presumption, because the fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"[156]—would, at worst, be a wash, and would more likely fall in favor of a finding of fair use. Almost by definition, there is no market for an orphan work, because without the authorization of the absent author, the work cannot be reproduced for sale. The actions of the publisher thus do not harm the market for the work; rather, they create the market.

This leads to another useful effect of the proposed fifth factor. The fourth factor often leads to circular reasoning, because to assess the effect of an alleged infringer's use on the market for a copyrighted work, a court must assume a market for licenses for the alleged infringer's use. Such a market will exist only if a court does not find that the use was fair.[157] Because the fourth factor is often dispositive,

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Reaches $125 Million Settlement with Authors, CNET (Oct. 28, 2008, 7:49 AM PDT), http://news.cnet.com/8301-13578_3-10076948-38.html. Under this Note's proposed framework, digitizing orphan works and making them available to the public would be a presumptively fair use.

154. The use would be commercial, the work—a novel—would be one that traditionally receives "thick" copyright protection, and the novel's publication would of necessity require the use of all of the original work.

155. Once the book has seen publication and a previously unknown author has stepped forward to challenge the publisher's use of his work, the scales would likely tip back in favor of enforcing the author's rights to the work. Compensating the author for further editions of his work—beyond the publisher's first publication—would provide an incentive for the author to create further works. Note that the effect of this incentive is lessened considerably if it is not the author but his heir who steps forward to claim the windfall.

156. 17 U.S.C. § 107(4) (2006).

157. Because a fair use is not an infringement, an author has no legally protectable interest in preventing it and therefore cannot reasonably expect to charge money for that use. *See* Campbell v. Acuff-Rose, 510 U.S. 569, 592 (1994) (noting, in a fair use case, that "the

allowing its determination to turn on circular, self-fulfilling reasoning guts the fair-use doctrine.[158] The new progress-weighing factor would restore balance by providing the courts with objective guidance: the question of whether a use promotes the advancement and dissemination of knowledge is one that is susceptible of empirical proof.[159]

This expansion of the fair-use doctrine through judges' inclusion of a fifth fair-use factor weighing progress-promoting values would help place copyright law back on course. Although its effects would destabilize some copyright holders' rights in their copyrighted works, that destabilization would extend primarily to situations in which the copyright holder's use was ineffective in advancing or disseminating knowledge.[160] And in those cases, it seems unobjectionable for the courts to assist Congress in ensuring that its laws do not flout the Constitution.[161]

CONCLUSION

One may hope that copyright's swallowing of the public domain cannot get much worse—that IP protections are approaching a nadir beyond which policymakers will realize the folly of their ways and start steering the ship of American copyright policy away from the shark-infested shoals of ever-increasing IP protection. When we find

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unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market").

158. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 620 (2008) ("Ultimately, the paradox of the fourth factor is that it is everything in the fair use test and thus nothing.").

159. *See generally* Comm'n of the European Communities, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases (Dec. 12, 2005) (unpublished working paper), *available at* http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf (providing empirical evidence that the European Union's adoption of a *sui generis* database protection right, akin to copyright, had a negative effect on the growth of Europe's database industry). For related discussion, see *supra* Part II.A.

160. To the extent that the destabilization would extend beyond these holders' uses, it would create pressure on all copyright holders to ensure that the uses being made of their works promote progress. To the extent that authors maintain ownership of their copyrights, this, concededly, might have the effect of channeling authorial resources away from the creation of new works. But in a regime in which authorship is often divorced from copyright ownership, it seems likely that the general progress-promoting pressure would outweigh any tangential progress-retarding effects.

161. *See* U.S. CONST. art VI ("The Senators and Representatives before mentioned . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

ourselves in a world in which IP laws increasingly serve not to promote progress but rather to retard it, policymakers' response must not be to rely on the vain hope that steering the present course—increasing the strength, reach, and duration of those laws—will solve the problem.

This Note is an attempt to provide one more navigational aid in the ever-growing panoply of scholarly opinion concerning copyright's excesses. Courts considering copyright-infringement cases could place substantive limits on copyright holders' monopolies on their works by finding fair use when it appears that others' use of those works better effectuates the constitutional mandate of the IP Clause.

It may not yet be too late to avoid a world in which advances in knowledge, literature, and art can come only after an investment of time and resources in discovering and licensing prior copyrighted work. We could instead return to a world with a rich, vibrant, and—most importantly—growing public domain upon which authors and artists can draw to "promote the Progress of Science and useful Arts."[162]

162. *Id.* art. I, § 8, cl. 8.